D.E.O. Enterprises, Inc. d/b/a Kelley & Hueber *and* Teamsters Local Union 107, a/w International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 4–RC–17608

November 27, 1992

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 16, 1991, and the hearing officer's report recommending disposition of them (pertinent portions of his report are attached). The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 31 for and 21 against the Petitioner with 12 challenged ballots, a number sufficient to affect the results of the election.[1]

The Board has reviewed the record in light of the exceptions and briefs,[2] has adopted the hearing officer's findings[3] and recommendations, and finds that a certification of representative should be issued. We do not, however, rely on all of the hearing officer's reasoning.

Frank Renzi, a former supervisor of the Employer who had been discharged on March 11, 1991, over 2 months before the election, acted as the Petitioner's election observer. The issue is whether the Petitioner's use of Renzi as its observer constituted objectionable conduct.

The hearing officer found that the Petitioner breached the Stipulated Election Agreement's requirement that nonsupervisory employees act as election observers by using Renzi, but that the breach was not material and was therefore not objectionable. We agree, although we find it unnecessary to rely on his rationale concerning the appropriateness of using supervisors as union observers. We rely instead on the undisputed fact that Renzi had no employment relationship of any kind with the Employer at the time of the election, and that, as the hearing officer found, the ''employees knew that [Renzi] was no longer employed by the company and in no position to affect their work life.''[4] In these circumstances, we find that Renzi's supervisory status with the Employer prior to his discharge does not affect the propriety of his serving as an election observer.[5]

[1] By order dated November 18, 1991, as corrected on November 26, 1991, the Board, in the absence of exceptions, pro forma adopted the Regional Director's report on challenged ballots and objections. In that report, he ordered a hearing on the objections and recommended that the challenges to the ballots of three employees, one of whom was Frank Renzi, be sustained, and that the challenges to the ballots of nine employees be overruled but not opened and counted because their ballots were no longer determinative.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] In his report, at p. 2, the hearing officer erroneously referred to Frank Renzi as the *Employer's* observer at the election. Additionally, on p. 6 of his report, the hearing officer mistakenly reported that employees Ahearn and James testified that they knew that *James* had been terminated before the election. We correct the record to reflect that Renzi was the *Petitioner's* election observer and that Ahearn and James testified that they knew that *Renzi* had been terminated before the election.

[4] In light of such employee knowledge, we find no merit to the Employer's argument that employees were coerced by Renzi's presence as an observer into supporting the Petitioner out of fear of future retaliation or hope of future reward. We note that Renzi's alleged claim that he would be returning to work for the Employer was made only to one employee (Johnny James) before the election, and that his additional claims to that effect were not made to other employees until after the election. The postelection claims could not have affected the results, and we conclude that Renzi's statement to James does not provide a basis for finding Renzi's presence coercive. Renzi's statement to James was ambiguous as to whether Renzi said that he *would* return to work or only that he *wanted* to do so. The hearing officer found that only the latter statement was made. See fn. 5 of his report. But even if Renzi made the former statement, our result would be the same. In this regard, we note that no evidence was presented to show that the Employer intended to rehire Renzi or to show why James would have any basis for believing Renzi's claim. More importantly, no evidence was adduced to show that this statement was disseminated to any other employee in the unit of approximately 64 employees. The burden of proof was on the Employer, as objecting party, to establish this fact. See *NLRB v. Mattison Machine Works*, 365 U.S. 123 (1961). Accordingly, we disagree with our dissenting colleague that Renzi's comment to one employee would cause all employees to believe that Renzi would be in a position in the future to affect their worklife.

We also find no merit in the Employer's argument that Renzi's presence was coercive because he had mistreated or discriminated against minority employees as a supervisor before his discharge. Renzi was discharged for that very misconduct, as the Employer notes. Given that his discharge occurred over 2 months before the election, we find that any coercive effect that his mistreatment of minorities (or any other employees) might have had on them and other employees had been dissipated.

In addition, we also note that the Employer's objection to Renzi's serving as an observer on the morning of the election was based solely on Renzi's status as a nonemployee. In the Employer's letter of objection to the Board, the Employer contended, inter alia, that ''so substantial a number of present employees have been hired since Mr. Renzi's discharge that his lack of acquaintanceship with a substantial portion of the electors would render his services as an observer dubious and ineffectual.'' Given that the Employer conceded on the day of the election that employee turnover was so great that Renzi would be unfamiliar with a ''substantial portion'' of the voting employees, we do not see how Renzi's presence as an observer, even assuming his prior supervisory status, could be coercive to new employees.

[5] We also note that the record is devoid of any evidence establishing that Renzi was an agent of the Petitioner, as urged by the Employer. Indeed, if we were to disallow an employee from serving as an observer on the basis of the Employer's expansive definition of union agency (i.e., initiating an organizing campaign, soliciting authorization cards and, actively campaigning on behalf of the union) we would be required to disqualify any active prounion employee.

In addition, with regard to the Petitioner's use of a nonemployee, we find that the Petitioner's breach of the Stipulated Election Agreement was not a willful, i.e., bad-faith breach. The Petitioner's business agent, William Hamilton, credibly testified that Renzi had informed him that he was a nonsupervisory group leader and that he had been laid off and was collecting unemployment compensation benefits. As an outsider to the Employer's operation, the Petitioner was unfamiliar with the employment history and status of the personnel. Thus, it had no reason to doubt Renzi's assertions—at least not until the morning of the day of the election, when the Employer gave notice of its objection to Renzi's serving as an observer and attempted to bar the Petitioner's representative and Renzi from its premises.[6] And even after receiving such notice, it cannot be said that the Petitioner acted unreasonably in continuing to place reliance on Renzi's assertions by insisting on keeping Renzi as its observer. The notice was short; the election was imminent; and the Petitioner had no basis on which to credit the Employer's contention that Renzi had been terminated and was thus a nonemployee over Renzi's contrary assertions. There was simply not enough time before the election for the Petitioner to conduct a thorough investigation into Renzi's current status and thereafter, if necessitated by the results of such an investigation, to obtain and instruct an employee to serve as an observer in Renzi's place.

In sum, although the Petitioner committed a technical breach of the Stipulated Election Agreement, the breach was neither material nor made in bad faith. Accordingly, we overrule the Employer's objections and shall issue the certification of representative.[7]

The Board has not adopted such a broad definition of agency and we decline to do so here.

[6] We note that, in its notice objecting to Renzi as an observer, there was no mention of Renzi having been a supervisor. As indicated in fn. 4, the objection was based wholly on his having been terminated and thus, not an employee.

Our dissenting colleague asserts that, on the day before the election, the Employer informed the Board agent that it objected to the use of Renzi as an observer because he was no longer an employee of the Employer. However, *the Union* was not informed of the problem until the morning of the election.

[7] Our dissenting colleague makes much of the fact that the use of Renzi as an observer deviated from the guidelines set forth in the Board's Casehandling Manual (Part Two) Representation Proceedings, Sec. 11310. We note that the Board has never held that deviations from the Casehandling Manual are per se grounds for setting aside an election, and we decline to do so here. See, e.g., *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990). In our view, the use of Renzi as an election observer does not warrant setting aside the election, especially where, as here, we have found that the Petitioner's selection and use of Renzi was reasonable under the circumstances, and where no allegations have put into question the Board agent's impartiality in allowing the election to proceed with Renzi serving as the Petitioner's observer.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local Union 107, affiliated with International Brotherhood of Teamsters, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, shipping and receiving employees, and plant clericals employed by the Employer, but excluding all other employees, including sales employees, office clericals, guards and supervisors as defined in the Act.

MEMBER OVIATT, dissenting.

I dissent. Contrary to my colleagues, I would find that the Petitioner's use of Frank Renzi as an election observer requires that the election be set aside.

On April 24, 1991, the parties entered into a Stipulated Election Agreement which contained the following provision:

> OBSERVERS. Each party may station an equal number of authorized *nonsupervisory-employee* observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally. [Emphasis added.]

Renzi was a supervisor who had been discharged by the Employer on March 11, 1991.[1] However, Renzi told the Petitioner's business agent, William Hamilton, that he was a nonsupervisory leadman and that he had been laid off.[2] Based on these representations Hamilton selected Renzi to be the Petitioner's election observer. The day before the election the Employer informed the Board agent that it objected to the use of Renzi as an observer because he was no longer an employee. Hamilton declined to select another observer.

It is undisputed that the Petitioner's use of Renzi as an observer was a breach of the Stipulated Election Agreement because Renzi was both a former supervisor and a nonemployee. The Board, however, will set aside an election based on a breach of a Stipulated Election Agreement only if the breach is material and significantly impairs the election process. Nevertheless, a party to a Stipulated Election Agreement is entitled to expect that other parties ''will diligently uphold provisions of the agreement that are consistent with Board

[1] No unfair labor practice charges were filed concerning the discharge.

[2] After Renzi's discharge the Employer informed the Pennsylvania Office of Employment Security that Renzi had been laid off and permitted him to collect benefits.

policy and are calculated to promote fairness in the election.''[3]

Initially, I note that the use of Renzi as an observer was contrary to the suggested guidelines in the Board's Casehandling Manual (Part Two) Representation Proceedings, Section 11310. That section states: ''Observers *must* be nonsupervisory employees of the employer, unless a written agreement by the parties provides otherwise.'' (Emphasis added.) Although I recognize that this is not a binding procedural rule, the guidelines were intended to provide operational guidance in the handling of an election and compliance with them ''is desirable . . . to safeguard a free and fair election.'' *Kirsh Drapery Hardware*, 299 NLRB 363 (1990), the Board will invalidate elections where the deviations from procedures raise a ''reasonable doubt as to the fairness and validity of the election.''[4] I believe that this is such a case.

My colleagues find that the breach of the Stipulated Election Agreement was not material because Renzi no longer had any employment relationship with the Employer at the time of the election and the employees knew he was not in any position to affect their work life. I disagree.

My colleagues concede that at the time of the election Renzi had claimed to at least one employee that he had not been discharged, but merely laid off, and he would be returning to work. I agree with the Employer that under such circumstances the employees could be coerced by Renzi's presence as an observer out of fear of future retaliation or hope of future reward. My colleagues dispose of this argument by stating that no evidence was adduced that the Employer intended to rehire Renzi. Nor did the Employer show why the employee would believe his claim. However, in relying on this absence of evidence I believe that my colleagues have misplaced the burden in this case. It was the Petitioner, not the Employer, who breached the Stipulated Election Agreement. In my view, it was the Petitioner who had the burden of showing that the breach was not material. In light of Renzi's representations to at least one employee that he would be returning to work and the fact that he was serving as an observer, a position reserved to employees by the election agreement, the employees had reason to believe that it was possible that Renzi would return.

The Employer has submitted evidence concerning Renzi's behavior that tends to support an inference that Renzi's use as an observer would be of great concern to the employees. Evidence was presented that Renzi had been discharged because he had mistreated or discriminated against minority employees. Evidence was also presented that he engaged in abusive behavior toward a female employee the day before the election[5] and that during the election he engaged in inappropriate and reprehensible behavior toward some Asian employees.[6] Although these incidents by themselves may have been insufficient to warrant setting aside the election, they indicate that Renzi had not reformed since his discharge. His presence as an election observer was highly coercive in light of his statements to employees that he had merely been laid off and would be returning to work, a return given at least some substance by his service as an observer. Under such circumstances, I find the breach of the Stipulated Election Agreement to be a material one warranting setting aside the election.[7]

[3] *Summa Corp. v. NLRB*, 625 F.2d 293, 295 (9th Cir. 1980); *Grant's Home Furnishings*, 229 NLRB 1305 (1977).

[4] See *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

[5] A female employee testified that Renzi attempted to give her a union leaflet, and when she would not take it, he called her a ''bitch'' and said if she did not vote for the Union she would be very sorry and that the Employer was no good to work for.

[6] When an Asian employee attempted to vote, Renzi stated that he needed to see some identification from these people, maybe a social security card or a green card. He later told the Employer's observer, while several Asian employees were standing in line to vote, that he wanted to see how many of them he could get deported.

[7] See *Summa Corp. v. NLRB*, supra, 625 F.2d 293 (breach of Stipulated Election Agreement concerning the number of observers considered to be material).